(26)

No. 91-194

In the Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION, PETITIONER

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP, RESPONDENT

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, INC., NATIONAL ASSOCIATION OF RETAIL DEALERS OF AMERICA, INC., NATIONAL HOME FURNISHINGS ASSOCIATION, INC., JEWELERS OF AMERICA, INC., AMERICAN FLOORCOVERING ASSOCIATION, MARINE RETAILERS ASSOCIATION OF AMERICA, ARIZONA RETAILERS ASSOCIATION, COLORADO RETAIL COUNCIL, CONNECTICUT RETAIL MERCHANTS ASSOCIATION, FLORIDA RETAIL FEDERATION, IDAHO RETAILERS ASSOCIATION, MICHIGAN RETAILERS ASSOCIATION, INC.,

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EQUIPMENT CO., PHILLIPS OFFICE SUPPLIES,
INC., SMITH OFFICE PRODUCTS, AND SMITH
OFFICE SUPPLY, INC., AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

QUESTION PRESENTED

Whether the Commerce or Due Process Clauses of the United States Constitution precludes a State from requiring an out-of-state seller to collect use taxes on property sold to customers in the State, when the seller regularly solicits in-state but has no physical presence in the jurisdiction.

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OFFICE SUPPLY, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici are businesses and organizations whose members include retailers throughout the United States. They are:

The *International Council of Shopping Centers, Inc.*, is an Illinois not-for-profit corporation. Its 24,000 members worldwide and 22,000 members in the United States include developers, owners, retailers, lenders, and all others having a professional interest in the shopping center industry. It represents almost all of the 36,650 shopping centers in the United States, which produced $723.3 billion in retail sales in 1990.

The *National Association of Retail Druggists, Inc.*, a Delaware corporation, is a private, non-profit, voluntary organization composed of independent retail pharmacists who own approximately 40,000 outlets across the country.

The *National Association of Retail Dealers of America, Inc.*, an Illinois corporation, has approximately 3200 company members who sell and service home appliances and electronic home entertainment products.

The *National Home Furnishings Association, Inc.*, an Illinois corporation, represents some 3500 company members who operate more than 13,500 home furnishing retail establishments in all 50 States.

The *Jewelers of America, Inc.*, incorporated in New York, represents more than 12,000 specialty retail jewelry stores operating 20,000 outlets in all 50 states.

The *American Floorcovering Association*, incorporated in Washington, D.C., represents 1800 retail floorcovering specialty stores with more than 4500 outlets.

The *Marine Retailers Association*, incorporated in Texas, represents 3500 marine and recreation boating retailers.

The *Arizona Retailers Association, Colorado Retail Council, Connecticut Retail Merchants Association, Florida Retail Federation, Idaho Retailers Association, Inc.,*

Michigan Retailers Association, Nebraska Retail Federation, North Dakota Retail Association, South Dakota Retailers Association, and *Texas Retailers Association* are associations that represent the interests of more than 17,000 retailers in their respective states.

The *Volunteer Office Products Association, Inc.*, a not-for-profit Tennessee corporation, represents some 175 firms in Tennessee and Kentucky engaged in the sale of office supplies, machines, and furniture.

Fortunoff Department Stores, incorporated in New York, is a retailer of jewelry and fine china with five locations in New York and New Jersey.

Wayside Furniture Store, incorporated in Connecticut, is a retailer of furniture, carpets, draperies, and accessories.

Plunkett Furniture Co. maintains eight retail stores in Illinois that sell furniture, draperies, carpeting, and other home furnishings and accessories.

A & W Office Supply, B & B Office Supply, Inc., Creswell Office Supply Co., Inc., Office Supply & Equipment Co., Phillips Office Supplies, Inc., Smith Office Products, and *Smith Office Supply, Inc.*, are Tennessee retailers and wholesalers of office supplies, machines, and furniture.

This case presents an issue of enormous importance to *amici*: whether mail order and direct marketing firms are constitutionally immune from state use taxes. Local retailers must collect and remit sales taxes in 45 States and the District of Columbia; such taxes are not imposed on sales made by out-of-state direct marketers. As a consequence, local retailers are placed at an enormous competitive disadvantage by a rule—contended for by petitioner—that also exempts direct marketers from a duty to collect compensating use taxes. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

[1] The parties' letters of consent pursuant to Rule 37 of the Rules of this Court have been filed with the Clerk of the Court.

STATEMENT

1. Like 44 other States and the District of Columbia, North Dakota imposes a tax on receipts from the sale of property within its borders. N.D. Cent. Code § 57-39.2. Like those other States, North Dakota also imposes a so-called compensating use tax on the in-state use of property that was purchased outside the State's taxing jurisdiction. N.D. Cent. Code § 57-40.2. Such use taxes, which are equivalent in amount to the sales tax imposed on in-state purchases of similar property, are designed both to prevent evasion of the sales tax by persons who make purchases out-of-state and to "put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977).[2]

In theory, the use tax falls upon the consumer who uses the property. See *National Geographic*, 430 U.S. at 558; Pet. App. A3. As the Court has noted, however, "the impracticability of [the use tax's] collection from the multitude of individual purchasers is obvious." *National Geographic*, 430 U.S. at 555. As a consequence, North Dakota imposes the burden of collecting the tax on all retailers "maintaining a place of business in this state" (N.D. Cent. Code § 57-40.2-07); that term is defined to include not only businesses physically present in the State, but also

> every person who engages in regular or systematic solicitation of sales of tangible personal property in this state by the distribution of catalogs, periodicals

[2] As a matter of practice, States do not attempt to impose their sales taxes on sales made in the State by direct marketers to out-of-state customers. See McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation*, 17 Urb. Law. 529, 532 (1985). It is an open question whether this practice is constitutionally compelled. See *Evco* v. *Jones*, 409 U.S. 91, 93 (1972); McCray, *supra*, 17 Urb. Law. at 554-555, 565-567. Virtually all States, including North Dakota, provide credits when sales and use taxes are imposed on the same transaction by different States. See *id.* at 532.

> advertising flyers, or other advertising, by means of print, radio or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting retail sales of tangible personal property.

N.D. Cent. Code § 57-40.2-01(7). The term "regular or systematic solicitation" is administratively defined to mean "three or more separate transmittances of any advertisement or advertisements" during a specified 12-month period. N.D. Admin. Code § 81-04.1-01-03.1(3).

2. Petitioner Quill Corporation is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. Pet. App. A2. It operates a national direct marketing business selling office supplies and equipment. *Ibid.* Petitioner does not maintain an office in North Dakota, does not send sales or other personnel into the State, and does not advertise through local newspapers or broadcast outlets. *Id.* at A39. Quill does, however, extensively solicit business in North Dakota through the use of catalogs and flyers; each year, it mails more than 60 such publications--involving more than 230,000 separate pieces of mail that, in the aggregate, weigh over 24 tons—to customers in the State. *Id.* at A3. Similarly, Quill licenses a computer software program to its North Dakota customers that permits them direct access to Quill's computer, where they may check inventory, confirm prices, and order merchandise. *Id.* at A29. In addition, Quill solicits customers by telephone and maintains a "help line" for customers to call with questions about its products. *Ibid.* As a consequence of this activity, Quill has several thousand customers and annual sales of just under $1 million in North Dakota, making it the sixth largest seller of office supplies in the State. *Id.* at A2-A3.

Although it is undisputed that petitioner meets the statutory definition of a "retailer maintaining a place of business" in the State (see Pet. App. A5), Quill refused to collect the tax on goods purchased for use in North

Dakota. See *id.* at A4. It based its position on this Court's decision in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), which held unconstitutional under the Due Process and Commerce Clauses of the United States Constitution the imposition of use tax liability on a mail order firm that did not have a physical presence in the taxing State. North Dakota responded by bringing this declaratory judgment action to settle Quill's liability. See Pet. App. A4. The trial court found the State's arguments in favor of the constitutionality of its use tax "quite persuasive" (*id.* at A40), but felt constrained by the decision in *Bellas Hess* to hold the tax unconstitutional as applied to Quill. *Id.* at A42.

The North Dakota Supreme Court reversed. Pet. App. A1-A36. The court began by observing that "[t]he economic, social, and commercial landscape upon which *Bellas Hess* was premised no longer exists," noting that " 'mail order' has grown from a relatively inconsequential market niche into a goliath now more accurately delineated as 'direct marketing.' " *Id.* at A11. The court explained that the volume of mail order sales has grown exponentially (*id.* at A12) and that, as a consequence of changing technology, "[t]oday a direct marketer can communicate with his customers across the country through toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication just as effectively, and more efficiently, than if he were calling personally on each customer." *Id.* at A13. The court also found that technological advances in computers and automated accounting systems "have greatly alleviated the administrative burdens created by [a use tax] collection duty." *Id.* at A26.

The court next observed that "the legal landscape [has] been altered in th[e] quarter-century" since *Bellas Hess* was decided. Pet. App. A13 (footnote omitted). The court below explained that, in the intervening period, this Court abandoned the "formalism" that previously had characterized decisions under the Commerce Clause. *Id.*

at A14; see *id.* at A15-A19. The state court also noted that this Court has "significantly broadened the closely related Due Process analysis in personal jurisdiction cases" (*id.* at A19), recognizing that "technological advances have made physical presence within the jurisdiction meaningless in modern commerce." *Id.* at A20. With this in mind, the court below held that "Quill's asserted lack of physical presence is not fatal to the State's attempt to require Quill to collect and remit use tax on its sales into North Dakota." *Id.* at A25. Instead, the court concluded that "the concept of nexus encompasses more than mere physical presence within the state, and that the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks." *Id.* at A25-A26.

Applying this standard here, the court found that Quill's links to North Dakota—its continuous solicitation of the North Dakota market, lease of computer software to in-state customers, disposal of catalogs in the State, and contacts with North Dakota financial institutions to check credit information—established sufficient nexus to support use tax liability. Pet App. A28-A35. The court also concluded "that the State provides benefits, services, and opportunities which significantly aid Quill's business and which are related to the use tax." *Id.* at A36. It accordingly rejected petitioner's claims under the Commerce and Due Process Clauses and held that Quill must collect and remit the use tax. *Id.* at A36.

SUMMARY OF ARGUMENT

1. The physical presence requirement that Quill draws out of *Bellas Hess* cannot be reconciled with this Court's modern decisions under the Commerce and Due Process Clauses. *Bellas Hess* expressly grounded its rule on the view, enunciated in decisions such as *Freeman* v. *Hewit*, 329 U.S. 249 (1946), that the Commerce Clause precludes most state taxation of interstate transactions. But the Court's landmark ruling in *Complete Auto Transit*,

Inc. v. *Brady*, 430 U.S. 274 (1977), flatly repudiated that approach, holding that interstate businesses have no special immunity from state taxation. The *Bellas Hess* rule cannot survive that conclusion.

Quill's argument that direct marketers will find it expensive and inconvenient to comply with North Dakota's use tax collection obligation—a contention that is, in any event, factually insupportable—does not dictate a departure from the *Complete Auto* approach. For obvious reasons, the Court never has held that compliance costs of the sort advanced by Quill invalidate state taxes; such a rule either would grant multistate enterprises complete state tax immunity or would require courts to make judgments about "acceptable" levels of taxpayer inconvenience that are wholly beyond their competence. Indeed, the physical presence rule contended for by Quill itself makes clear that administrative expenses are irrelevant in the Commerce Clause calculus: the Court has held that entities such as Sears, Roebuck & Co., and the National Geographic Society, which maintain a physical presence nationwide, must collect use taxes even though they face precisely the same administrative difficulties as does Quill.

2. The Due Process Clause also does not support the physical presence rule. The Court has held that a defendant's physical absence cannot defeat a State's exercise of adjudicatory jurisdiction; Quill thus could be haled into a North Dakota court if one of its products injured an in-state customer. There is no reason to suppose that the State nevertheless lacks the authority to impose a duty on Quill to collect a tax arising out of the same transaction—a duty that is considerably less burdensome than the requirement that Quill regularly appear in a distant jurisdiction's courts. To the contrary, the Court has held that the assertion of taxing and adjudicatory jurisdiction should be governed by the same standard. Quill has offered no authority, and no reason of policy, to depart from that conclusion.

3. The Court should disapprove the *Bellas Hess* physical presence rule. The rule's doctrinal underpinnings have been stripped away. It stands in considerable tension with rules applied by the Court in closely analogous due process and Commerce Clause settings. It creates irrational distinctions between physically absent direct marketers on the one hand and national retailers (such as Sears) on the other. And it grants direct marketers an enormous competitive advantage over local (and national) retailers that has no constitutional justification. In these circumstances, the Court should not reaffirm a defective constitutional rule that it might be beyond the power of Congress to correct.

ARGUMENT

There are several points that appear to be common ground between the parties in this case. *First*, although Quill conclusorily asserts that the North Dakota law imposes "cumulative and discriminatory" burdens on interstate commerce (Br. 34), it does not contend that the State's use tax fails the second or third prongs of the Commerce Clause test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279, 287 (1977), which respectively require that state regulations of interstate commerce be fairly apportioned and nondiscriminatory. Such a contention would, in any event, be insubstantial: the use and sales tax obligations imposed on in-state and out-of-state merchants by North Dakota are wholly equivalent, while a use tax collection requirement by definition poses no risk of discriminatory or malapportioned burdens. See *National Geographic*, 430 U.S. at 558. Similarly, Quill does not question "the principle that 'interstate commerce may be made to pay its own way.'" *Complete Auto*, 430 U.S. at 289 n. 15. See *id.* at 281, 288.

Second, notwithstanding its asserted lack of physical presence in the State, Quill plainly takes advantage of benefits and services provided by North Dakota. This seems self-evident. The State "runs mass transit and maintains public roads" that permit Quill's solicitation of orders and delivery of goods (*D.H. Holmes Co.* v. *Mc-*

Namara, 486 U.S. 24, 32 (1988)); it "supplies a number of other civic services" (*ibid.*) that make possible development of the pools of affluent consumers who purchase Quill's products; and it offers the "other advantages of civilized society" (*Goldberg* v. *Sweet*, 488 U.S. 252, 267 (1989)) that are essential for the operation of functioning markets. Quill sensibly does not deny that its business in North Dakota—and the profits that it draws from the State—are made possible by these state services. It thus is evident that the obligation imposed upon Quill by North Dakota is "tied to the earnings which the State * * * has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes," *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 446 (1940). This is enough to satify the fourth prong of the *Complete Auto* test, which requires a fair relation between the tax and the benefits provided by the State. See *Goldberg*, 488 U.S. at 266-267; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 624, 627 (1981).

Third, it is plain that the Due Process Clause does not disable States from asserting their authority over out-of-state entities in circumstances that are closely analogous to those involved here. Most notably, the Court has held unequivocally in the area of *in personam* jurisdiction that a State's authority "may not be avoided merely because the defendant did not *physically* enter the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476 (1985) (emphasis in original). North Dakota courts thus could assert jurisdiction over Quill if, for example, an in-state purchaser brought suit because he was injured by one of the products that Quill shipped into the State. Again, Quill does not contend otherwise.

Against this background, a single, narrow question is presented here: whether an in-state physical presence is necessary to justify what otherwise would be a concededly constitutional exercise of North Dakota's taxing authority. And this question may be narrowed still further by considering the peculiar characteristics of the rule that

Quill draws from *Bellas Hess*. Although Quill suggests (Br. 28) that a "slight[]" presence would not support the assertion of a State's taxing jurisdiction, the decisions cited by Quill make plain that the in-state presence of even a *single* employee would be sufficient. See *National Geographic*, 430 U.S. at 557; *Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, 419 U.S. 560, 562 (1975).[3] That physical presence, moreover, need have nothing to do with the sales activity that gives rise to the use tax obligation. See *National Geographic*, 430 U.S. at 560-561. Quill therefore is contending for a purely formal rule under which the economic realities—here, the direct marketer's extensive and continuous exploitation of the in-state market—would be irrelevant; instead the presence or absence of what Professor Hartman has described as "a few 'warm bodies'" would be dispositive. Hartman, *Collection of the Use Tax on Out-of-State Mail Order Sales*, 39 Vand. L. Rev. 993, 1014 (1986).

In our view, Quill's rule cannot be reconciled with the Court's modern approach to the Commerce and Due Process Clauses. At least since the time of the decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945), the Court has affirmed that the due process nexus test "cannot be simply mechanical or quantitative." And the Court's Commerce Clause jurisprudence now involves a similarly "practical analysis" that looks to "economic realities." *Complete Auto*, 430 U.S. at 279. The wooden physical presence rule that Quill draws from *Bellas Hess* cannot survive application of these tests.

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[3] While Quill contends (Br. 28) that *National Geographic* rejected a test that would have hinged nexus on the "slightest presence" within the State, that characterization is not entirely accurate; the Court concluded that the taxpayer's in-state presence *in fact* was "much more substantial * * * than the expression 'slightest presence' connotes." 430 U.S. at 556.

I. THE *BELLAS HESS* PHYSICAL PRESENCE RULE CANNOT BE RECONCILED WITH THE COURT'S CURRENT COMMERCE CLAUSE AND DUE PROCESS DOCTRINE

At the outset, a certain lack of clarity in the *Bellas Hess* opinion presents a special difficulty for analysis; the Court failed to make explicit whether it meant its holding to rest on the Commerce Clause, the Due Process Clause, or both. For reasons explained by North Dakota (at Br. 15-17), we believe that *Bellas Hess* principally involved a construction of the Commerce Clause, a conclusion that is shared by most neutral commentators. See Hartman, *supra*, 39 Vand. Law. Rev. at 1004; Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 Vand. L. Rev. 961, 984-985 (1986); Hellerstein, *State Taxation and the Supreme Court*, 1989 Sup. Ct. Rev. 223, 227 n.25. It is plain, however, that *neither* Clause supports Quill's physical presence requirement.

A. The Court Has Rejected The Commerce Clause Theory That Underlies *Bellas Hess*

Perhaps the most striking feature of the briefs offered by Quill and its *amici* is their almost total failure, over many hundreds of pages, to offer any principled Commerce Clause justification for the physical presence rule. With the exception of their arguments about the administrative expense of complying with North Dakota's tax collection requirements—a point addressed below—Quill and its *amici* suggest no Commerce Clause rationale for the physical presence requirement, and make no serious attempt to integrate that requirement into the rest of the Court's modern Commerce Clause doctrine. On examination, the reason for this omission comes clear: *Bellas Hess* rests on a reading of the Clause that the Court has since expressly repudiated.

1. Although there has been tension in the Court's Commerce Clause holdings over the years (see *Goldberg*, 488 U.S. at 259; *Complete Auto*, 430 U.S. at 278-279), at the time of the decision in *Bellas Hess* the Court generally

precluded taxation of multistate transactions unless the levy somehow could be characterized as falling on interstate commerce indirectly, as where there was some separable "local incident" that could serve as a peg for the exercise of state authority. See, *e.g.*, *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537 (1951). See generally *Complete Auto*, 430 U.S. at 280. This rule found its most forceful expression in *Freeman* v. *Hewit*, 329 U.S. 249 (1946), where the Court invalidated a tax on the gross receipts from an interstate sale because the levy fell on "the very process of interstate commerce." *Id.* at 253. As the Court subsequently explained, *Freeman* "announced a blanket prohibition against any state taxation imposed directly on an interstate transaction." *Complete Auto*, 430 U.S. at 279. The rule applied in *Freeman*, as in cases that followed it such as *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), treated "direct tax[es] on interstate sales, even if fairly apportioned and nondiscriminatory, [as] unconstitutional *per se*." *Complete Auto*, 430 U.S. at 280. The *Freeman* approach thus deemed "irrelevant any consideration of the practical effect of the tax. The rule reflect[ed] an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation." *Id.* at 278 (footnote omitted). See generally Lockhart, *A Revolution in State Taxation of Commerce?* 65 Minn. L. Rev. 1025 (1981).

Bellas Hess avowedly rested its approach to nexus on this understanding of the Commerce Clause. In language that directly echoed the *Freeman* rationale, the *Bellas Hess Court* premised its holding on the perception that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." 386 U.S. at 759. Indeed, *Freeman* was the Commerce Clause authority principally cited by *Bellas Hess* (see *id.* at 756) en route to its conclusion that state and local governments have "no legitimate claim to impose 'a fair share of the cost of the local government'" on physically absent direct marketers (*id.*

at 760)—a judgment that presumably turned on the perceived illegitimacy of taxes that were not tied to local incidents.[4]

Complete Auto, however, swept away the underpinning for this analysis. That decision, which clarified and rationalized Commerce Clause jurisprudence, made plain that interstate businesses have no special immunity from state taxation. See 430 U.S. at 288. The Court there overruled *Spector*. *Id.* at 288-289. And while the *Complete Auto* Court had no occasion to address the factual holding of *Freeman*, it expressly rejected "the philosophy underlying [*Spector's*] rule" (*id.* at 288), noting with evident approval that "[t]he rule announced in *Freeman* was viewed in the commentary as a triumph of formalism over substance." *Id.* at 281. As the Court repeatedly has explained in the intervening years, *Complete Auto* thus renounced *Freeman*'s "formalistic approach" (*Trinova Corp.* v. *Michigan Dept. of Treasury*, 111 S. Ct. 818, 828 (1991)), abandoning "the abstract notion that interstate commerce 'itself' cannot be taxed by the States." *D.H. Holmes Co.*, 486 U.S. at 30.

The physical presence rule cannot survive the tack taken in *Complete Auto*. In place of the "formal[]" and "abstract" (some would say metaphysical) rule of *Freeman*, *Complete Auto* mandates use of a "practical analysis" (430 U.S. at 279) that asks the functional question "whether the tax produces a forbidden effect." *Id.* at 288. See, *e.g.*, *Goldberg*, 488 U.S. at 259-260 n.11. Here, of

[4] The rationale for the *Freeman* approach was the fear that "permit[ting] the states to tax interstate commerce itself would threaten unmanageable burdens on commerce." Lockhart, *supra*, 65 Minn. L. Rev. at 1131. *Bellas Hess* tracked that analysis precisely, expressing concern that the imposition of use tax collection obligations by many jurisdictions "could entangle National [Bellas Hess's] interstate business in a virtual welter of complicated obligations to local jurisdictions." 386 U.S. at 759-760. The Court's interest here seemingly was as much with the theoretical impropriety of taxing interstate commerce "itself" as with the actual administrative difficulty of complying with state law.

course, Quill recognizes that North Dakota's rule would *not* have such an effect so long as the direct marketer had some minimal physical presence in the State. And in the face of Quill's extensive, continuous contacts with North Dakota—as well as the substantial benefits that its direct marketing activities derive from the State—Quill's focus on the presence or absence of the occasional warm body has "no relationship to economic realities." *Complete Auto*, 430 U.S. at 279. See *id.* at 288. Here, the important "realities" are the innumerable (and expensive) state services that facilitate Quill's direct marketing business; by contrast, the benefits that North Dakota would provide to a single in-state employee are insubstantial.

It should be added that Quill is incorrect in asserting (Br. 29-33) that the Court has reaffirmed the *Bellas Hess* physical presence requirement in the years since *Complete Auto*. The Court has cited *Bellas Hess* on a handful of occasions for the proposition that there is *a* nexus requirement—a proposition that is confirmed by *Complete Auto* and with which we do not quarrel. See *Goldberg*, 488 U.S. at 263; *Commonwealth Edison*, 453 U.S. at 626. But in each case the Court distinguished *Bellas Hess* (or simply did not address the substance of the nexus requirement) and upheld state power to tax. See *Goldberg*, 488 U.S. at 260-268; *D.H. Holmes*, 486 U.S. at 33; *Commonwealth Edison*, 453 U.S. at 626; *National Geographic*, 430 U.S. at 559-562. Indeed, since deciding *Bellas Hess* the Court never has applied its physical presence rule. This authority hardly establishes the vitality of the *Bellas Hess* holding.[5]

[5] Even prior to *Bellas Hess*, the Court did not apply the physical presence rule; as *amici* National Governors' Association *et al.* note, the Court, while upholding jurisdiction to tax when the taxpayer was physically present, had no occasion to determine the status of the tax when the taxpayer was physically absent. (That is not surprising; the technology of the day made exploitation of distant markets difficult.) The only decision during that period invalidating a state use tax did not turn on the physical presence issue; instead, the Court drew a distinction between "active and aggressive operation

2. Quill's principal response to this argument—indeed, virtually its only response—is its contention that it would be expensive and inconvenient for direct marketers to comply with state and local use tax obligations. Br. 34-44. Initially, it should be noted that Quill's practical concerns in this regard are subsantially overstated. As North Dakota demonstrates (at Br. 43), by July 1992 fewer than 200 jurisdictions will impose use tax reporting requirements—and a direct marketer would assume even that many reporting obligations only if it solicited business repeatedly (and successfully) in every jurisdiction in the nation. Similarly, Quill's concern about the difficulty of calculating and collecting use taxes for many jurisdictions "vastly underestimates the skill of contemporary man and his machines" (*Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting)); computer software that is available at modest expense greatly facilitates meeting the collection obligation. See North Dakota Br. 39-43. The proof of the pudding here is in the experience of national mail order operators such as Sears, Roebuck & Co., Montgomery Ward & Co., and the National Geographic Society—none of which have found it difficult to comply with use tax collection obligations, identical to those at issue in this case, that were upheld by this Court.[6]

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within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 347 (1954). The tax was voided because there "was no invasion or exploitaiton of the [taxing State's] consumer market" by the taxpayer. *Ibid.* It may be added, in any event, that the vitality of *Miller Bros.* is itself in doubt. See *National Geographic*, 430 U.S. at 563 (Blackmun, J., concurring in the result).

[6] The Court held that each of these entities, which maintained a physical presence in the taxing State, could be required to collect use taxes on their mail order sales. *National Geographic*, 430 U.S. at 562; *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373 (1941). That physical presence, moreover, did not in any way alleviate the administrative burden of collecting the use tax. The Court assumed in *Sears* and *Montgomery Ward* that the local retailing operation

More fundamentally, however, administrative expenses of the sort that concern Quill are simply irrelevant in the Commerce Clause calculus. Even while the rule of *Freeman* held sway, this Court consistently explained that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). See *Complete Auto*, 430 U.S. at 279, 288.[7] The reason for this approach is plain. There always will be costs to complying with tax laws in more than one State; a firm that has income-producing divisions in several jurisdictions will, for example, have to file several state income tax returns, and may as a consequence be forced to create a larger tax compliance department than those maintained by com-

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on the one hand, and the national mail order business on the other, were "separately administered." *National Geographic*, 430 U.S. at 560. See *Sears*, 312 U.S. at 364-365; *Montgomery Ward*, 312 U.S. at 375. And the Court in *National Geographic* held it irrelevant that the taxpayer's in-state activities were *wholly* unrelated to the mail order business. 430 U.S. at 560-562; see *id.* at 554 n.2. (The Court was able to uphold the taxes in *Sears* and *Montgomery Ward* on the theory that, "[w]hatever may be the inspiration for these mail order sales, however they may be filled, [the State] may rightly assume that they are not unrelated to [the taxpayer's] course of business in [the State]. They are nonetheless a part of that business though none of [the taxpayer's] agents in [the State] actually solicited or placed them." *Sears*, 312 U.S. at 364. The tax thus was sufficiently tied to local activity to satisfy a pre-*Complete Auto* Court. In *National Geographic* the Court abandoned any requirement that there be such a tie.) In addition, of course, a substantial number of other mail order firms are collecting use taxes without evident difficulty. See generally Morse & Zimmerman, *Efforts to Collect State Sales Tax on Interstate Mail-Order Sales: Recent State Legislation* (1990) (prepared for presentation to the National Conference of State Legislatures).

[7] The Court made this observation in rejecting the contention that firms should be relieved of the burden of paying nondiscriminatory and fairly apportioned taxes; the Court's comment obviously applies as well to the claim that firms could be relieved of the lesser burden flowing from the requirement that they collect a use tax from others.

parable firms that conduct business in only one State. But these sorts of compliance costs—which inevitably will be higher for businesses with multistate operations than for those that operate only intra-state—never have been thought to invalidate state income taxes on multistate companies.

The situation here is no different in principle. Indeed, in the use tax setting the Court *already* has rejected arguments from administrative convenience identical to those advanced by Quill. See *Sears*, 312 U.S. at 365 ("cost and inconvenience" irrelevant). That is hardly surprising: a contrary rule either would grant multistate enterprises complete state tax immunity or would require courts to make standardless judgments about "acceptable" levels of administrative inconvenience that are wholly beyond their competence. See *Commonwealth Edison*, 453 U.S. at 628.[8]

In fact, even on its own terms Quill's argument from administrative convenience does not support the *Bellas Hess* physical presence rule. As Quill recognizes, under the physical presence approach—and this Court's decisions in *National Geographic*, *Sears*, and *Bellas Hess* itself—States may impose use tax collection obligations on firms that fortuitously have a physical presence in the jurisdiction. Under that rule, national retailers such as Sears must collect use tax on mail order sales in every jurisdiction in the nation. Yet entities such as Sears and National Geographic face the same administrative burdens as do Quill and other physically absent direct mar-

[8] The situation here stands in contrast to cases where the state levy, while facially neutral, effectively taxes out-of-state businesses at rates higher than those imposed on in-state firms. That was so, for example, in *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 286 (1987), where a flat tax on trucks was found "plainly discriminatory" because it applied to trucks traveling in interstate commerce at a per mile rate approximately five times as heavy as that applied to local trucks. We are not aware of any decision in which the Court invalidated a tax because the administrative costs of compliance—rather than the tax itself—were alleged to be higher for interstate than for in-state firms.

keters in calculating and collecting use taxes. See note 6, *supra*. This makes clear that administrative expense cannot defeat use tax liability—and that the sole functional rationale advanced by Quill does not support its rule. It also, of course, confirms that the inconvenience of compliance could not have been the rationale for *Bellas Hess*. See note 4, *supra*.

It is worth adding that the premise of Quill's argument from administrative expense—that the imposition of use tax collection liabilities would create competitive inequalities between local and multistate businesses that do not now exist—is itself flawed. As an initial matter, the rule contended for by Quill would not protect interstate businesses generally; it would help a small group of retailers (physically absent direct marketers) and disadvantage both local *and* multistate retailers. In any event, it is the existing complete tax immunity of physically absent direct marketers that most profoundly distorts the marketplace. See Advisory Comm'n on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales* 5 (1986) (hereinafter cited as "ACIR Report"); Hellerstein, *supra*, 39 Vand. L. Rev. at 982. Local retailers, of course, are obligated either to pass on sales taxes to their customers or to absorb the levies themselves. The competitive advantage that this gives physically absent direct marketers over local retailers (and over national retailers that maintain a physical presence in many jurisdictions) is substantial; with state sales taxes now levied at rates ranging from 2% to 7.5%, and with local governments imposing additional sales taxes at rates ranging up to 4.25% (see ACIR Report 23), the most widely accepted analyses indicate that every 1% increase in a jurisdiction's sales tax may reduce local sales by some 6%. Pet App. A65. See generally ACIR Report 38-40; Mowen, Wiener & Young, *Consumer Store Choice and Sales Taxes: Retailing, Public Policy, and Theoretical Implications*, 66 J. Retailing 222, 234-235, 238 (1990). Nothing in the Commerce Clause, which was not intended to "place [interstate]

commerce in a privileged position" (*Commonwealth Edison*, 453 U.S. at 623), requires such a result.

3. These observations raise the question whether nexus should properly be part of the Commerce Clause inquiry at all. Although often suggesting that an equivalent nexus test is applicable under the Commerce and Due Process Clauses, the Court has said surprisingly little about the policies served by a Commerce Clause nexus requirement. It appears that the only clear Commerce Clause justification for the nexus inquiry offered by a Member of the Court was Justice Rutledge's pre-*Complete Auto* suggestion that the use of a "local incident" as a hook for taxation could act as "a safeguard, to some extent, against repetition of the same or a similar tax by another state." *Freeman*, 329 U.S. at 271 (Rutledge, J., concurring). But that concern is now addressed directly by the apportionment prong of the *Complete Auto* test, which—without regard to nexus—serves to "ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-261. And in any event, in the particular use tax context at issue here, the Court has explained that "[t]he out-of-state seller runs no risk of double taxation" because it "becomes liable for the tax only by failing or refusing to collect the tax from th[e] resident consumer." *National Geographic*, 430 U.S. at 558.[9]

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[9] Prior to the decision in *Bellas Hess*, the Court generally discussed nexus under the rubric of the Due Process Clause. See, *e.g.*, *J.C. Penney*, 311 U.S. at 444; *International Shoe*, 326 U.S. at 320. Cf. *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960) (Court discusses nexus in Commerce and Due Process Clause challenge without separately addressing provisions). So far as we are aware, the Court first separately stated a Commerce Clause nexus requirement in *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), a pre-*Complete Auto* decision in which the majority held that the taxpayer, to escape taxation, was required to show that the operations subject to the levy were "dissociated from the local business and interstate in nature." *Id.* at 441 (citation omitted). In conducting this search for local activity, the Court continued, "[w]e must determine whether [the tax] is so closely related to the local activities of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Id.* at 448, quoting *Miller Bros.*, 347 U.S. at 344-345. The Court thus equated the pre-*Complete Auto* Commerce Clause requirement of a "local incident" with the due process minimum contacts test. This approach was challenged by Justice Brennan, who maintained that the minimum contacts requirement "was formulated to meet the quite different problem of defining the requirements of the Due Process Clause." *Id.* at 450 (Brennan, J., dissenting). Justice Goldberg also dissented, arguing that notions of fairness are unrelated to the apportionment concerns at which the Commerce Clause is directed. See *id.* at 457-462 (Goldberg, J., dissenting). The Court has since endorsed Justice Goldberg's *General Motors* dissent (see *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 241-242 (1987))—making the decision a questionable prop for the nexus requirement.

For its part, Quill offers remarkably little in the way of a justification for the Commerce Clause nexus requirement. It does suggest that a nexus rule protects "the national economy" because "*it is the activities or presence of the taxpayer in the State* that may properly be made to bear a 'just share of state tax burden.'" Br. 11-12, quoting *Commonwealth Edison*, 453 U.S. at 626 (emphasis added by Quill). Again, however, this concern is addressed through the second and fourth prongs of the *Complete Auto* test. And certainly, it is not a mail order firm's in-state *physical* presence that serves as the acceptable measure of the state tax burden; the use tax obligation imposed on a physically present direct marketing firm (such as, for example, National Geographic or Sears) is measured by mail order sales that are wholly unrelated to the firm's in-state property.

Having said this, there is no need for the Court to consider here whether nexus is appropriately addressed under the rubric of the Commerce Clause. It is enough to note that Quill has entirely failed to explain why physical presence—rather than purposeful and continuous economic exploitation of the in-state market—should be necessary to trigger tax collection liability.

B. The Due Process Clause Does Not Impose A Physical Presence Requirement

1. The concept of nexus does have historic roots in due process; for over a century, the Due Process Clause has been understood to require connections between the forum and the out-of-state individual against whom the State seeks to assert its adjudicatory or taxing authority. See, *e.g.*, *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878) (adjudicatory jurisdiction); *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U.S. 385, 398 (1903) (taxing jurisdiction). And since the time of the decision in *International Shoe*, due process has been understood to require "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (citation omitted). The Court also has indicated that "the taxing power exerted by the state" must "bear[] fiscal relation to protection, opportunities and benefits given by the state." *J. C. Penney*, 311 U.S. at 441-442. But (with the arguable exception of *Bellas Hess* itself) Quill is wholly without support in jumping from these standards to the conclusion that *physical presence* in the jurisdiction is necessary to make out the required connection.

To the contrary, the Court has made clear in the context of personal jurisdiction that a State's authority

> may not be avoided merely because the defendant did not *physically* enter the forum State. * * * [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Burger King Corp. v. *Rudzewicz*, 471 U.S. 462, 476 (1985) (emphasis in original). See *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 109-110 (1987) (opinion of O'Connor, J.); *id.* at 117-120 (Brennan, J., concurring in part and concurring in the judgment); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-298 (1980). Under these precedents, as we explain at the outset, North Dakota courts plainly could assert jurisdiction over Quill if it were sued by an in-state customer. See *Burger King*, 471 U.S. at 473; Pet. App. A24. There is no reason to suppose that the State nevertheless lacks authority to impose a duty to collect a tax on Quill arising out of the same transaction.

Citing Justice Douglas's concurring opinion in *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 653-654 (1950), Quill nevertheless insists that *in personam* and taxing jurisdiction are governed by different standards. See Br. 33-34. The short answer to this contention is that the Court held in *International Shoe* itself—which was both a personal jurisdiction and a jurisdiction to tax case (see *Shaffer* v. *Heitner*, 433 U.S. 186, 203 (1977))—that due process objections to personal jurisdiction and to state taxing authority must be judged by the same standard: "The activities which esablish [the taxpayer's] 'presence' subject it alike to taxation by the state and to suit to recover the tax." 326 U.S. at 321. And that is hardly surprising, since the same "minimum contacts" formula is the touchstone in each setting. Compare, *e.g.*, *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen*, 444 U.S. at 291; *International Shoe*, 326 U.S. at 316, with *National Geographic*, 430 U.S. at 561; *Miller Brothers*, 347 U.S. at 345.[10]

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[10] In *Travelers* itself, the majority upheld a State's application of its Blue Sky law to a physically absent mail order insurance company, rejecting "[m]etaphysical concepts of 'implied consent' and 'presence'" (339 U.S. at 649) while using the *International Shoe* standard. See *id.* at 648. As for Justice Douglas, shortly after issuing his opinion in *Travelers* he dissented from the Court's invalidation of the Maryland use tax at issue in *Miller Bros.*; citing the holding in *Pennoyer*, Justice Douglas concluded that, so long as the State could assert adjudicatory jurisdiction over the seller's property, "I see nothing in the Due Process Clause which would prevent

In fact, there is no functional distinction between the assertion of adjudicatory and taxing jurisdiction that dictates the use of different standards in the two settings. When an out-of-state defendant is required to appear in court to answer, for example, a product liability claim, the defendant is judged according to the forum's law and will be found liable if it failed to comply with the forum's standards. See *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 311-313 (1981) (opinion of Brennan, J.); *Restatement (Second) of Conflict of Laws* §§ 6, 9 (1971). Cf. *Burger King*, 471 U.S. at 477. And as this Court has recognized, amenability to suit inevitably will lead to compliance with the rules developed by the forum to regulate conduct, at least if the defendant regularly conducts business in the jurisdiction. See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495, 498-499 n.19 (1987); *Restatement (Second) of Torts* § 4 (1965); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on the Law of Torts* 25 (5th ed. 1984). Because compelled compliance with the forum's standards is a necessary consequence of the assertion of long-arm jurisdiction, a contact that satisfies traditional notions of fair play for adjudicatory purposes should do so as well when, as here, the State seeks to impose an essentially regulatory tax collection burden.

Similarly, there is no reason that the individual's interest in escaping arbitrary state action—the concern that underlies the due process jurisdictional limits (see *Burger King*, 471 U.S. at 472 n.13; *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-703 n.10 (1982))—should dictate the application of different standards to assertions of adjudicatory authority on the one hand and taxing or regulatory authority on the other. So long as the tax (or the regulation) bears the appropriate relation to values or opportunities provided by the State, it is difficult to see why

Maryland from making [the seller] a collector for taxes." 347 U.S. at 358 (Douglas, J., dissenting).

notions of fundamental fairness require a closer connection to tax (or to regulate) than to compel the defendant's appearance in court. To the contrary, regularly collecting use taxes on mail order sales is considerably *less* burdensome than regularly appearing in court in a distant jurisdiction. Indeed, the Court already seemingly has reached this conclusion, holding in one important circumstance that lesser connections support taxation than are necessary for adjudication: the presence of the defendant's property in the State does not support jurisdiction over an unrelated cause of action (see *Rush* v. *Savchuk*, 444 U.S. 320, 328 (1980); *Shaffer*, 433 U.S. at 209), but does, under *National Geographic*, permit the imposition of use tax obligations on transactions that are unrelated to the property. It therefore would be anomalous to hold here that more substantial connections are needed to tax than to assert *in personam* jurisdiction.[11]

And the connections here surely are substantial enough to make it fair for North Dakota to assert jurisdiction over Quill. It is apparent from the record—indeed, it is

[11] Quill asserts (Br. 33-34) that the *Bellas Hess* Court implicitly rejected an equivalence between the taxing and adjudicatory standards when it failed to apply (or even to cite) adjudicatory decisions such as *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), which upheld the exercise of state jurisdiction over physically absent defendants. That manifestly is not so, however. Almost contemporaneously with the decision in *Bellas Hess*, the Court dismissed for want of substantial federal questions two appeals in which state courts had upheld the exercise of state taxing and regulatory authority against out-of-state mail order insurance companies. *People* v. *United National Insurance Co.*, 427 P.2d 199 (Cal.), *app. dismissed*, 389 U.S. 330 (1967); *Ministers Life & Casualty Union* v. *Haase*, 141 N.W.2d 287 (Wisc.), *app. dismissed*, 385 U.S. 205 (1966). The standards applied by the state courts in those decisions "were identical to the Supreme Court standards for judicial jurisdiction." McCray, *Overturning* Bellas Hess: *Due Process Considerations*, 1985 B.Y.U.L. Rev. 265, 288. Because these summary rulings involved only the Due Process Clause (Congress having lifted dormant Commerce Clause restrictions on the insurance business in the McCarran-Ferguson Act), this background suggests, if anything, that *Bellas Hess* rests principally on the Commerce Clause.

apparent from the 24 tons of catalogs that Quill annually directs to North Dakota (see Pet. App. A3)—that Quill systematically, continuously, and purposefully solicits North Dakota customers. This activity is, of course, "significantly associated with the taxpayer's ability to establish and maintain a market in th[e] state for the sales." *Tyler Pipe*, 483 U.S. at 250. And needless to say, Quill's products are purposefully directed into North Dakota. In these circumstances, the use tax collection obligation "bears fiscal relation to protection, opportunities and benefits given by the state." *J.C. Penney*, 311 U.S. at 444. In such a case, "[t]he simple but controlling question is whether the state has given anything for which it can ask return" (*ibid.*); here, it plainly has.

II. THE COURT SHOULD REJECT THE *BELLAS HESS* PHYSICAL PRESENCE RULE

This review of the law makes clear, in our view, that the doctrinal underpinnings of *Bellas Hess* have been stripped away. The decision (and the rationales advanced for it) stand in considerable tension with the rules applied by the Court in closely analogous due process and Commerce Clause settings. The *Bellas Hess* rule creates an irrational and inequitable distinction between physically absent direct marketers on the one hand and national retailers such as Sears and National Geographic on the other. And it grants direct marketers an unfair competitive advantage over local (and national) retailers that has no discernible basis in the Constitution. In these circumstances, the Court should overrule *Bellas Hess* to the extent that it establishes physical presence as a prerequisite for the exercise of state taxing authority.

Overruling a decision, of course, is not a step that the Court takes lightly. At the same time, however, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' *Smith* v. *Allwright*, 321 U.S. U.S. 649, 665 (1944). *Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' *Helvering* v.

Hallock, 309 U.S. 106, 119 (1940)." *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2609-2610 (1991) (parallel cites omitted). See *id.* at 2617-2618 (Souter, J., concurring). In particular, the Court has not hesitated to disapprove rulings that were "decided before some important developments in the constitutional law" (*Alabama* v. *Smith*, 490 U.S. 794, 802 (1989)) and therefore "do not fit into [the Court's current] analytical framework." *Collins* v. *Youngblood*, 110 S. Ct. 2715, 2721 (1990). See, *e.g.*, *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 343 (1989); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989). Perhaps the most notable examples of this practice followed the watershed holding in *Complete Auto* itself, in whose wake the Court overruled or otherwise disapproved some eight decisions (not including *Spector*, which was overruled in *Complete Auto*).[12] In this setting, it would be a *refusal* to reject the pre-*Complete Auto* rule of *Bellas Hess* that would be extraordinary.

In response to this point, Quill and some of its *amici* suggest that the matter of *Bellas Hess* should be left to Congress. But as the decisions following *Complete Auto* make clear, the possibility of congressional action never has kept the Court from maintaining consistency in its Commerce Clause decisions. Equally to the point, Quill also argues that *Bellas Hess* rests on the Due Process Clause—and the Court has expressly left open the question whether Congress has the authority to set aside de-

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[12] See *Department of Revenue* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), ov'g *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Commonwealth Edison*, 453 U.S. at 617, disapproving *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Scheiner*, 483 U.S. at 292-296, disapproving reasoning of *Aero Mayflower Transit Co.* v. *Board of Railroad Commrs.*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n*, 295 U.S. 285 (1935); *Goldberg*, 488 U.S. at 265 n.16, departing from holdings of *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384 (1935), *Western Union Tel. Co.* v. *Pennsylvania*, 128 U.S. 39 (1888), and *Ratterman* v. *Western Union Tel. Co.*, 127 U.S. 411 (1888).

cisions in this area that are grounded on that Clause. See *ASARCO, Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 327-328 n.23 (1982); *id.* at 331 (O'Connor, J., dissenting). Indeed, several of Quill's *amici*, arguing that Congress lacks the constitutional authority to modify *Bellas Hess*, successfully opposed congressional action that would have authorized the States to require use tax collection.[13] Arguments relating to the institutional role of Congress thus come from North Dakota's opponents with diminished force.

In any event, the arguable presence of due process considerations here makes it unclear whether Congress could remedy the problems caused by the *Bellas Hess* rule. Yet it is plain that, if the Court overturns *Bellas Hess*, Congress could *protect* direct marketers (by, for example, mandating use of a uniform tax rate by state and local governments) in the unlikely event that the administrative problems posed by Quill prove insuperable. Indeed, Congress took just such a step in Pub. L. No. 86-272, codified at 15 U.S.C. 381, the statute at issue in *Wisconsin Department of Revenue* v. *William Wrigley, Jr., Co.*, No. 91-119. In these circumstances, prudence suggests that the Court hestitate before reaffirming a defective constitutional rule that it might be beyond the power of Congress to correct.

At the same time, the reliance interests advanced by Quill and its *amici* are not substantial. While there may be doubt about the validity of a law setting aside the

[13] See *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 74-79 (1988) (prepared statement of Lucas A. Powe, Jr., on behalf of Direct Marketing Association and Magazine Publishers Association); *Collection of State Sales and Use Taxes by Out-of-State Vendors, Hearing on S. 639 and S. 1099 before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance and Taxation*, 100th Cong., 1st Sess. 43-44 (1988) (statement of Lucas A. Powe, Jr., on behalf of the National Marketing Association, Inc.).

physical presence rule, direct marketers have been aware for some years that Congress might enact such legislation.[14] And they surely also are aware—given the Court's reservation of the issue in *ASARCO*—that such a law might be sustained. At the least, then, disapproval of *Bellas Hess* (whether by Congress or this Court) hardly could come as a complete surprise. Quill's interest in continuing to benefit from an inequitable tax preference accordingly cannot outweigh society's overriding concern with the consistency of this Court's constitutional doctrine.

In all, the *Bellas Hess* rule was controversial from its inception: Justice Fortas, writing for three Members of the Court, had "no doubt" at the time that "large-scale, systematic, continuous solicitation and exploitation of the [in-state] consumer market is a sufficient 'nexus'" to support tax liability. 386 U.S. at 761 (Fortas, J., dissenting). Cf. *Payne*, 111 S. Ct. at 2611 (noting relevance of "spirited dissents challenging the basic underpinnings" of a decision). In the years since the *Bellas Hess* decision, its physical presence rule never has been applied in a holding of this Court. That rule creates irrational distinctions in practice and is insupportable as a matter of theory. It should not be reaffirmed.

[14] Bills that would modify *Bellas Hess* have been introduced several times in recent years. See, *e.g.*, H.R. 2230, 101st Cong., 1st Sess., 135 Cong. Rec. H1662 (daily ed. May 4, 1989); S. 480, 101st Cong., 1st Sess., 135 Cong. Rec. S1913 (daily ed. Mar. 1, 1989); H.R. 3521, 100th Cong., 1st Sess., 133 Cong. Rec. H8916 (daily ed. Oct. 27, 1987).

CONCLUSION

The judgment of the North Dakota Supreme Court should be affirmed.

Respectfully submitted,

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